LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JAN 4 1963
JOHN F. DAVIS, CLERK

No. 721

In the

Supreme Court of the United States

OCTOBER TERM, 1962

CARSON J. MAY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

C. RICHARD GRIESER,
8 East Broad St., Columbus 15, Ohio,
Attorney for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX

Opinions by Courts Below 1
Jurisdiction of the Court 2
Questions Presented for review 3
Statutes Involved 4
Statement of the Case 6
Argument 10
Writ of Certiorari Should be Granted 10
Question No. 1 11
Questions No. 2 and 3 15
Questions No. 4 and 5 18
Conclusion 22

Appendix

Appendix A—Decision of the Court of Common Pleas 23
Appendix B—Opinion of the Court of Appeals 30
Appendix C—Entry in the Court of Appeals 33
Appendix D—Notice of Appeal in the Supreme Court of Ohio 34

Authorities

Bailey vs. Central Vermont Rwy. Co., 319 U.S. 350 19
Blair vs. Baltimore & Ohio Railroad Co., 323 U.S. 600. 10, 19
Cuyahoga River Power Co. vs. Northern Realty Co., 244 U.S. 300, 37 Sup. Ct. 653 2
Deen vs. Gulf Colorado & Santa Fe Rwy. Co., 353 U.S. 925, reversing 275 S.W. 2d 529 ..... 10, 21
Dice vs. Akron, Canton & Youngstown R. Co., 342 U.S. 359 10

Ferguson vs. Moore-McCormick Lines, 352 U.S. 521 11

Harris vs. Pennsylvania Railroad Co., 361 U.S. 15 ....13, 14

Keesecker, a minor, vs. B. M. McKelvey Co., 141 Oh. St. 162, 169 2

Lillie vs. Thompson, 332 U.S. 459 12
Louisville & Western Rwy. Co. vs. Green, 53 S. 2d 358.. 21

Ringhiser vs. Chesapeake & Ohio Railway Co., 354 U.S. 901 12
Rogers vs. Missouri-Pacific Rwy. Co., 352 U.S. 500 ..... 12, 14, 20

The Swetland Co. vs. Evatt, Tax Commissioner, 139 Oh. St. 6, 18 2
Thompson vs. Texas & Pacific Rwy. Co., 77 Sup. Ct. 698, reversing 232 Fed. 2d 313 .....10, 20, 21
Tiller vs. Atlantic Coastline R. Co., 318 U.S. 54 17

Union Pacific Co. vs. Hadley, 246 U.S. 330 19

Village of Brewster vs. Hill, 128 Oh. St. 343, 352, 353... 2

Wilkerson vs. McCarthy, 336 U.S. 53 19

Statutes

Title 28, U.S.C., Section 1257 .....3, 4
Title 45, U.S.C., Section 51 .....2, 4, 6
Title 45, U.S.C., Section 53 .....4, 6, 17
Title 45, U.S.C., Section 54 .....4, 5, 6, 17
Title 45, U.S.C., Section 56 5

In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

CARSON J. MAY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

OPINIONS BY COURTS BELOW

Petitioner, Carson J. May, respectfully prays that a writ of certiorari issue to the Court of Appeals for Franklin County, Ohio, to review the judgment and decision of that Court in Case No. 6749 entitled Carson J. May vs. Pennsylvania Railroad Company, a corporation, which court in an opinion which is as yet unreported, dated March 13, 1962, (App. B), affirmed the judgment of the Court of Common Pleas for Franklin County, Ohio. The said Court of Common Pleas for Franklin County, Ohio, entered a judgment for respondent pursuant to a verdict directed for respondent at the close of the petitioner's evidence. Petitioner's motion for new trial was denied, and the unreported decision of the same trial court on that motion, dated March 14, 1961, is appended to this petition (App. A).

JURISDICTION OF THE COURT

The entry of the judgment of Court of Appeals for Franklin County, Ohio, of which review is sought, was dated March 29, 1962 (App. C).

Petitioner sought review of the judgment and decision of the Court of Appeals for Franklin County, Ohio, by motion filed in the Ohio Supreme Court for an order directing the Court of Appeals to certify its record to the Ohio Supreme Court. Review by the latter court was discretionary upon the ground that the case was one "of public or great general interest," Constitution of Ohio, Article IV, Section 2. This review was denied by the Ohio Supreme Court when it overruled petitioner's motion to certify its record by entry dated October 10, 1962 (App. D). That denial constituted a refusal by that court to exercise its discretionary power to review, and the denial did not constitute an affirmance of the judgment of Court of Appeals and was not a decision upon the merits. *Village of Brewster vs. Hill*; 128 Oh. St. 343, 352, 353; *The Swetland Co. vs. Evatt, Tax Commissioner*, 139 Oh. St. 6, 18 (paragraph 2 of syllabus); *Keesecker, a minor, vs. The B. M. McKelvey Co.*, 141 Oh. St. 162, 169 (paragraph 3 of syllabus).

Under the law of Ohio, therefore, when the Ohio Supreme Court denied motion to certify on October 10, 1962, the judgment of the Court of Appeals for Franklin County, Ohio, became the final judgment of the highest court of the State of Ohio in which a decision could be had. *Cuyahoga River Power Co. vs. Northern Realty Co.*, 244 U.S. 300, 37 S. Ct., 653.

This action arose and was tried under the provisions of the Federal Employers' Liability Act, Title 45, U. S. C., Sections 51 and following. Jurisdiction of this court to review the said judgment of the Court of Appeals for Franklin County, Ohio, by writ of certiorari is, accordingly,

conferred upon this court by the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U.S.C., Section 1257. The portions of that section pertinent to jurisdiction in this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * * * * * * * * * *
> "(3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes of * * * the United States."

QUESTIONS PRESENTED FOR REVIEW

1. In this action arising under the Federal Employers' Liability Act where petitioner, a track laborer, while carrying a heavy tub of coal with another employee of respondent and while following the other employee who preceded him through a doorway, was injured when he was forced to twist and lift upward in order to clear the moving tub between the side of the doorway and the side of a motor car parked in the doorway, were the Ohio courts correct in holding that the respondent as a matter of law was not negligent for the reason that the occasion of the injury appeared to be the first time that such a tub with loaded coal had been carried through the doorway while the motor car was in the entrance way and it appeared that this was the place where the car was customarily located when work was to be done on it?

2. Under the foregoing circumstances were the acts and conduct of the other employee those of the respondent so as to present an issue for the jury on respondent's exercise of reasonable care, or as the Ohio courts apparently reasoned, must those acts and conduct be judicially discounted, ignored or chargeable to petitioner by means of the courts' own conclusions that the evidence presented no extraordi-

nary activity on the part of the respondent railroad or that petitioner was chargeable with equal control over the job?

3. In holding that respondent as a matter of law was not negligent, did the Ohio courts interject conduct of the petitioner in alleged concert with another employee of respondent, that is, the doctrine of assumption of risk or contributory negligence by petitioner or the fellow-servant rule, as an unlawful and absolute defense to respondent under the guise of non-negligence of respondent?

4. In making the judicial determination of whether an issue of negligence was presented for the jury should the Ohio courts have viewed the evidence and the conduct of respondent as a whole?

5. From such a consideration could the jury conclude from the evidence with reason that respondent was negligent and that such negligence played some part in producing the petitioner's injury?

STATUTES INVOLVED

This action invoked the Federal Employers' Liability Act. Title 45, U.S.C., Sections 51 and following. That portion of Section 1 of that Act, Title 45, U.S.C., Section 51, which is involved in this review, provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, wharves, or other equipment."

Also involved in this case are sections 53 and 54 of that Act dealing with contributory negligence and assumption of risk, respectively. Title 45, U.S.C., Section 53:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Title 45, U.S.C., Section 54:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employees."

Jurisdiction of the federal claim arising under the foregoing act on the part of the State court is provided in Section 56 of the act, Title 45, U.S.C., Section 56, which provides as follows:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be

doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

STATEMENT OF THE CASE

This action was filed, answered and tried under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following, in the Court of Common Pleas for Franklin County, Ohio. Petitioner's cause of action was based upon allegations that he sustained injuries while employed by respondent, a common carrier by railroad, resulting from respondent's negligence. At the close of petitioner's evidence at the trial, the Court of Common Pleas sustained the respondent's motion for a directed verdict in favor of the respondent and judgment was entered accordingly. Petitioner's motion for new trial was overruled and the trial court's decision thereon is appended to this petition. (App. A) The Court of Appeals for Franklin County, Ohio, in Case No. 6749 affirmed the decision and judgment of the Court of Common Pleas (Opinion, App. B) and the entry of affirmance was filed in the Court of Appeals on March 29, 1962 (App. C). Petitioner sought review in the Ohio Supreme Court by motion to certify the record, but that motion was denied by the Ohio Supreme Court by order entered October 10, 1962 (App. D).

At the trial the evidence showed that petitioner was a laborer for the respondent and a member of a track crew assigned to the job of maintaining the tracks and right of way of respondent. On the morning of January 15, 1957, petitioner reported for duty at the respondent's Spruce Street tool house in Columbus, Ohio. (R. 3, 4, 72) This tool house was the place where the men reported for work and also was the place where they returned after they finished their work. (R. 10, 75, 76) There were t o rooms in

the tool house, one containing a stove, toilet, and washing facilities (R. 76) and the other housing a motor car which was used by the crew in going to and from their places of work on the tracks of respondent. (R. 74) The tool house had formerly been heated by a steam-heating system, but this had been removed. (R. 12) The only means of heating the tool house was an old iron, potbellied stove in which coal was burned. (R. 12, 76) No coal was provided for that stove by respondent. (R. 6) There was neither a bin nor a pile of coal inside or outside of the tool house. (R. 5, 76) In order to provide coal for the stove, it was necessary for the men of the crew to take an old washtub and go out along the tracks and to pick up pieces of coal that were strewn along the tracks. (R. 7) The gathering of the coal for the stove was necessary not only to provide warmth and comfort for the men, but, according to petitioner, to prevent the washing and toilet facilities from freezing. (R. 80) Picking up the coal, furthermore, was a part of the crew's duties in keeping the area free of debris. (R. 7, 115)

The foreman in charge of the crew, Tracy E. Hopper, testified that on the morning in question the motor car required repairs. Due to the fact that there was no light provided inside the tool house in the room where the motor car was housed, it was necessary to push the motor car out of the room so that sufficient light could be shed on the car to perform the work. (R. 4) The foreman and his crew pushed the motor car, accordingly, out from the room to a point where it was approximately half inside and half outside of the doorway. (R. 4, 75) The work was thereupon completed.

The foreman further testified that some of the members of the crew suggested that they go out and get coal for the stove in the tool house and that he okayed the suggestion. (R. 5) Petitioner testified that the foreman told them to

get the coal. (R. 77) In either event the record is clear that the foreman knew that petitioner and another crewman, Henry Brown, took the tub and went out through the doorway in order to pick up coal among the tracks for the stove. (R. 8) This was the method that had been used in the past to get coal for a considerable period of time; and the foreman knew of this and so testified (R. 5, 6).

The foreman then left the immediate area to place a telephone call to respondent for permission to put the motor car onto the tracks so that the crew could proceed to their place of work for the day. (R. 9) In the meantime petitioner and Brown went from place to place among the tracks in the area, picking up coal and putting it into the tub, until they eventually filled the tub with the coal. (R. 77, 78) The two of them then started back toward the toolhouse carrying the tub between them, each holding one of the two handles on the tub. As they arrived at the doorway to the tool house, Brown was leading and passed through the doorway first, followed by the tub and then the petitioner. The doorway was still blocked by the motor car. As the tub came to the doorway, there was not sufficient clearance to permit the tub to pass through between the lower part of the motor car and the side of the doorway. As petitioner followed through the doorway, therefore, it was necessary for him to lift the tub upward where the motor car was narrower and thereby clear the lower part of the motor car and at the same time to twist his body sideways in order to get through (R. 78-80). In so doing, petitioner injured his back, suffering herniated discs, which injuries eventually required surgery upon his back and removal of the herniated discs. (R. 34, 35, 48-50) Petitioner in the opinion of the operating physician is permanently disabled from heavy manual labor. (R. 48)

At the conclusion of the cross examination of petitioner by respondent's counsel, the trial judge further cross examined the petitioner. (R. 127-129) The judge was successful in drawing from the petitioner the admission that the foreman was some 300 or 400 feet away from the doorway as Brown and petitioner approached the doorway and that the crew would not go out onto the job until receiving an order from the foreman to do so. From that the trial judge drew the further admission from petitioner that there was, consequently, no hurry about getting the coal into the tool house. Petitioner, in further response to the court's questioning testified that he had never carried coal into the tool house when the motor car was in the doorway but that he had frequently carried coal in the tub to the stove when the motor car was out of the doorway. Petitioner, however, denied the judge's suggestive question to the effect that the motor car could have been easily moved (R. 128), and on redirect examination stated that it would have taken the entire gang to move the motor car out of the doorway (R. 139). At the time the other men were inside the tool house (R. 127) and petitioner concededly made no request for help (R. 122). The foreman, however, was in charge of the crew and petitioner had no authority to give orders or instructions to the other members of the crew (R. 3, 122). Shortly following the foregoing cross examination of petitioner by the trial judge, the same court sustained the respondent's motion for a directed verdict. The court's stated basis for that action was that petitioner had not shown that the respondent railroad company was negligent. (R. 132, 133)

The stated grounds for the decision of the Court of Appeals are set forth in the final two paragraphs of the opinion (App. B). These will be examined in petitioner's argument.

ARGUMENT

Writ of Certiorari Should Be Granted

The Ohio courts have deprived petitioner of his basic and fundamental Federal right to trial by jury under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following. A substantial portion of the relief granted by Congress under that Act has therefore been removed. *Dice vs. Akron, Canton, & Youngstown Railroad Co.*, 342 U.S. 359, *Blair vs. Baltimore & Ohio Railroad Company*, 323 U.S. 600.

The denial of jury trial in this case was perpetrated by the holding of the lower courts that the evidence of petitioner failed to show that respondent was negligent. In reaching this judicial conclusion, the Ohio courts failed to follow the fundamental concepts set forth in decisions of this Court, which control the determination of whether issues for the jury are presented under the Act. In addition, the holding of the lower courts on the facts was in conflict with the judgment of this Court in the cases of *Deen vs. Gulf Colorado and Santa Fe Rwy. Co.*, 353 U.S. 925, reversing 275 S.W. 2d 529, and *Thompson vs. Texas & Pacific Railway Co.*, 77 Sup. Ct. 698, reversing 232 Fed. 2d 313, where this Court applied the correct and controlling fundamental principles to reverse decisions of the lower courts which had similarly deprived raliroad workers of their right to trial by jury under the foregoing Act. In short, the Ohio courts have decided an important Federal question, namely, the right to trial by jury under a Federal act applying to hundreds of thousands of employees, by a judicial holding which is in conflict with the decisions of this Court on the facts, but even more serious, is in conflict with the fundamental concepts and principles set forth by this Court in determining whether issues of negligence are presented for the jury under that Act.

Petitioner will sustain the foregoing contentions in terms of the questions presented for review under the evidence in this case.

Question No. 1

Perhaps the foremost error of the lower courts was their holding in effect that respondent as a matter of law was not negligent and could not be held to anticipate injury to petitioner since there was no evidence that the loaded tub had been carried through the doorway while the motor car was parked in the doorway on any occasion previous to that when petitioner was injured. The trial court expressed the foregoing in the following words (App. A-28.):

> "There is no evidence that any of the employees had carried coal into the building under the same or similar conditions before and no knowledge attributed to defendant that coal would be carried into the building under such conditions."

The Court of Appeals said essentially the same thing in the following statement (App. B-32.):

> "In this case it appears to be the first time that the tub of coal was ever carried through the doorway while the motor car was in the entrance way, and it further appears that the place where the motor car rested was the place at which it was customarily moved whenever work was needed on it."

The foregoing concept applied by the Ohio courts would require a previous duplication or repetition of the precise circumstances of the petitioner's injury in order for a jury issue of negligence to be presented. This rule is in direct conflict with the decisions of this Court both in principle and in fact. In *Ferguson vs. Moore-McCormick Lines*, 352 U.S. 521, the employee was furnished a scoop for ice cream. The ice cream was frozen hard and the employee, unable to get the ice cream out of with the scoop, seized a sharp knife

and in attempting to get the ice cream out with the knife cut his hand. There was no evidence that the employee in that case had ever used the knife for that purpose previously. This Court clearly and specifically held that such evidence was not necessary to create an issue of foreseeability or anticipation on the part of the employer. The rule was stated at page 523:

> "It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident."

A fortiori, it was not necessary that the respondent railroad in this case be in such a position that it actually *observed* the *duplication* of the same exact chain of circumstances on occasions prior to the date of the petitioner's injury.

Similarly, in the leading case of *Rogers vs. Missouri-Pacific Railway Co.*, 352 U.S. 500, there was no evidence that any other employee than the petitioner in that case had, while backing away from a fire he himself had started, slipped and fallen over the culvert invloved in that case. Again, in the case of *Lillie vs. Thompson*, 332 U.S. 459, there was no evidence of any previous occurrence such as the one for which liability was imposed against the railroad, namely, the intentional and criminal assault by a third party upon a woman employee in an isolated shanty.

The controlling rule on the issue of foreseeability has been set forth by this Court that if the record discloses any probative facts from which a jury could find that the respondent railroad company was or should have been aware of conditions which created a likelihood that petitioner would suffer injury, then the issue must be submitted to the jury. *Rogers vs. Missouri-Pacific Railway Co.*, 352 U.S. 500, 503; *Ringhiser vs. Chesapeake & Ohio Railway Co.*, 354 U.S. 901. The evidence in this case clearly shows

that co-employee Brown went through the partially blocked doorway first, followed by the loaded tub of coal and then finally by petitioner. When the tub arrived at the doorway, there was insufficient clearance between the lower part of the motor car and the doorway. Petitioner, on the move and carrying the tub, was consequently forced to lift upward on the tub and at the same time to twist in order to permit the tub to pass through at a higher level where there was sufficient clearance between the side of the car and the doorway.

Certainly on that evidence fair-minded men could have concluded that respondent through its employee Brown could have anticipated, indeed observed, that the narrow clearance at the lower level would not permit passage of the tub and would require the petitioner who was following behind him to lift upward and that injury to petitioner might result from such an effort. In short, the requirement for a jury issue of negligence or foreseeability on the part of the respondent has been far exceeded on the foregoing evidence in this case. Here there was evidence of actual prior knowledge and notice on the part of respondent through its employee that the precise job which led to the injury was being performed and, in addition, actual participation in that same job (to the extent of leading the way) by respondent through its employee.

The foregoing proof of knowledge, notice and participation by respondent renders the lower courts' holding in irreconcilable conflict with the judgment of this Court in the case of *Harris vs. Pennsylvania R. Co.*, 361 U.S. 15. There the employee was injured while assisting in retracking derailed cars on the line and property of another railroad. The jury in answer to interrogatories found that the employer was negligent "in that the tie of the track he was required to walk was elevated a substantial distance above

the ground level and was covered with grease or oil, thereby affording unstable footing." Significant to the pertinent issue in the instant case, there was no evidence in the *Harris* case that the employer placed the oil or grease on the tie or knew anything about the conditions on the third-party property. The Ohio Supreme Court entered judgment for the railroad employer. This Court, however, applied the *Rogers* rule and reversed, holding that the foregoing finding of the jury did support a reasonable conclusion that employer negligence played a part in producing the employee's injury.

Thus the requirement for a jury issue on whether respondent could have anticipated injury in the *Harris* case was met, although it is clear that there was no evidence of any prior similar occurrence and no evidence of any actual knowledge by or notice to the employer of the conditions on third party property leading to the injury. Contrast the instant case where respondent through its employee had actual knowledge of and observation of the conditions on its own property, including those at the doorway, and then actively participated in the precise activities which under those known conditions in fact led to the petitioner's injury.

The *Harris* holding, we repeat, cannot be reconciled in principle with that of the Ohio courts herein.

In summary, the lower courts not only erred in applying the wrong test for a jury issue on foreseeability, but they unlawfully usurped the jury's function and attempted to carve out, circumvent or discount the foregoing plain evidence concerning respondent's co-employee. This attempt will be exposed in petitioner's argument and under Questions No. 2 and 3.

Questions No. 2 and 3

The Court of Appeals in its opinion referred to the foregoing contention of petitioner as follows (App. B-..):

> "* * * because the other employee went through the doorway first, it raised the question of knowledge through the other employee, that plaintiff could not get through the doorway while the motor car was in that position."

The Court of Appeals apparently could not answer that contention and the only possible reference thereto is found in the last paragraph of the same opinion (App. B-32.):

> "It does not appear from the record that there is any evidence indicating any unusual or extraordinary activity on the part of the railroad company * * *."

It is not clear whether the Court of Appeals recognized that the activity of the other employee did constitute activity on the part of the respondent railroad company, or whether the Court was simply referring to activity other than that of Brown as that of the railroad company. In either event, the Court of Appeals could not be correct. If the court meant to delete the conduct of employee Brown, then the court was simply and unlawfully carving out vital evidence by judicial fiat. If, on the other hand, the Court of Appeals meant to include the activity of that employee in the above reference, the Court was caught in its own inconsistency. In the very preceding paragraph the court made the point that the occasion of the injury was "the first time the tub of coal was ever carried through the doorway while the motor car was in the entranceway * * *." This could only have been stated in support of the court's judicial conclusion of non-negligence on the part of the respondent railroad and obviously referred to the immediately preceding paragraph as to whether "there were any probative facts from which a jury could find that the railroad

company was or should have been aware of conditions which created a likelihood that the petitioner would suffer such an injury as he did * * *." In other words, the jury could not so conclude, held the court, because this was the first time the tub of coal had been carried through the doorway while the motor car was in the entranceway. Yet in the next paragraph (if Brown's conduct is intended to be included) the court makes the completely inconsistent statement and holding that the same activity as a matter of law was not unusual or extraordinary! In short, it is logically untenable to make a judicial conclusion as a matter of law that Brown's carrying the tub through the blocked doorway was not "unusual or extraordinary" and at the same time to assert that very same activity, namely, that this was the first time that a tub of coal was ever carried through the blocked doorway, to support the opposite judicial conclusion that respondent as a matter of law could not have anticipated the same.

The trial court attempted to meet the same evidence head-on and in so doing unwittingly revealed the actual basis for his decision. In this respect the trial court stated (App. A-28.):

> "Counsel's argument that the other employee who was assisting in the process, by starting through the opening ahead of plaintiff, in effect, compelled plaintiff to follow, is not persuasive, as plaintiff had equal control over the method used and had as much right to stop as he had to proceed."

In this revealing paragraph the trial court in reality set forth the core of his reasoning, and it is quite probable that this same basis was implicit in the Court of Appeals' decision. The trial court held as a matter of law that petitioner had "equal control over the method used" with employee Brown, and petitioner "had as much right to

stop as he had to proceed." Even if we assume arguendo that those conclusions were the only reasonable ones which could be drawn from the evidence, the respondent was not absolved from responsibility as a matter of law; for even in that event Brown's equal control and conduct remained as the conduct and control of the respondent railroad. Brown's conduct and control could not be lawfully charged to petitioner on the ground that the latter had equal control in determining whether an issue of the negligence of *respondent* was presented. Otherwise, the outlawed fellow-servant rule has been excavated and given life contrary to the will of the Congress. *Tiller vs. Atlantic Coastline R. Co.*, 318 U.S. 54, 67. Similarly, petioner's equal control or right to stop or proceed (assuming that such was the only reasonable conclusion) could not absolve respondent from responsibilty as a matter of law. A contrary conclusion would (and the trial court did) inject the petitioner's conduct and choice, which could amount to no more than petitioner's contributory negligence or his assumption of the risks involved, as an unlawful and absolute defense to the respondent's duty to exercise reasonable care. This was, of course, contrary to the will of Congress expressed in the statutes dealing with contributory negligence and assumption of risk (Title 45, U.S.C., Sections 53 and 54). *Tiller v. Atlantic Coastline R. Co.*, 318 U.S. 54.

It is apparent in assessing the evidence that in fact opposite conclusions could be reasonably made. Fair-minded men could well conclude that since co-employee Brown arrived at the doorway first and was leading the way, he had the first and best opportunity to gauge the opening and to observe whether there was safety in passing through or not. Fair-minded men, moreover, could also conclude with reason that the petitioner, following behind

and carrying a moving tub of loaded coal, did not in fact have equal control over the job and could not have stopped without risking injury to his co-employee and perhaps to himself. While an argument to the contrary could be made on the evidence, the foregoing conclusively demonstrates that the issue was arguable and was exclusively within the jury's province to decide.

The lower courts were, in summary, in error in holding as a matter of law that petitioner had equal control and had as much right to stop as to proceed. On the evidence a contrary conclusion as a matter of fact could well have been reached by the jury. Even, however, if we assume that the only reasonable conclusion from the evidence is that petitioner had such control, then the result which the lower courts would impose, namely, non-negligence of respondent as a matter of law, could not lawfully follow. Such reasoning either unlawully eliminated the evidence of the other employee, or as a matter of law absolved respondent from its duty to exercise due care on the basis of the conduct and control of petitioner. The lower courts, therefore, injected either the fellow-servant rule or contributory negligence or assumption of risk by petitioner under the guise of a stated holding of non-negligence of respondent. This was another fundamental error of the lower courts in the unlawful denial of petitioner's right to trial by jury.

Questions No. 4 and 5

So far petitioner has confined the scope of his argument to the evidence in connection with the actual circumstances of the injury. An over-all view of the evidence in this case reveals still another fundamental error in the reasoning and holding by the Ohio courts. Those courts failed to apply the unitary rule of negligence which requires a reviewing court to view the evidence as a whole. The rule was

well stated in the descriptive words of Justice Holmes in the case of *Union Pacific Co. vs. Hadley*, 246 U.S. 330, at page 332:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

The foregoing rule has been consistently applied in actions arising under the Federal Employers' Liability Act. *Bailey vs. Central Vermont Ryg. Co.*, 319 U.S. 350; *Blair vs. Baltimore & Ohio Railroad Company*, 323 U.S. 600; *Wilkerson vs. McCarthy*, 336 U.S. 53.

The evidence in this case presented conditions and circumstances wherein the court should have given particular note to that rule and applied the same; for many of the facts and conditions imparted character to each other and were interrelated so as to form a pattern which the jury could have concluded was negligence on the part of respondent. A consideration of "the whole bundle," not merely "each separate stick," would have included a survey of such evidence as: the fact that the tool house was the central gathering place of crewmen, the duty of petitioner to clear the area of coal, the lack of heating facilities other than a coal-burning stove in the toolhouse, petitioner's testimony that heat was necessary to prevent freezing of washing and toilet facilities in the toolhouse, the failure of the railroad to supply coal for that stove either in a bin or in a convenient pile close by or otherwise, the consequent neces-

sity for petitioner and others to scrounge for coal by picking it up among the various tracks and putting it into any receptacle they could lay their hands on, the necessity to use a wash tub for that purpose, the moving of the motor car into the doorway as a result of the lack of inside lighting so that repairs could be made, the knowledge of the foreman in charge that petitioner and Brown had gone out to gather coal in a wash tub for the purpose of taking the coal to the stove to provide heat, the foreman's knowledge of past practice in gathering coal, the foreman's knowledge that the motor car remained in the doorway after petitioner and Brown had started to obtain coal, the foreman's failure to order the removal of the motor car from the doorway, the fact that Brown was leading the way as he and petitioner approached the doorway carrying the tub, and the consequent lifting and twisting of the heavy tub of coal in order to get through the narrow opening in the doorway, between the side of the doorway and the side of the motor car.

From a consideration of the foregoing as a whole, fair-minded men certainly could conclude and find with reason a pattern of negligence on the part of the respondent railroad.

The holding of the Ohio courts was in conflict in principle, as we have shown, with leading decisions of this Court. In addition, that holding conflicted with analogous decisions of this Court on the evidence. In the case of *Thompson vs. Texas & Pacific Rwy. Co.*, 77 Sup. Ct. 698, reversing 232 Fed. 2d 313, this Court applying the *Rogers* rule held that issues of negligence on the part of the railroad were presented for the jury where a woman employee working alone was injured while handling mail even though there was an absence of evidence that the employee had asked for more help or that her employer had been notified that there was

more mail than she could handle or an unusually large amount of mail. In a similar case involving two employees, *Deen vs. Gulf Colorado & Santa Fe Ruy. Co.*, 353 U.S. 925, reversing 275 S.W. 2d 529, this Court again held that issues of negligence were presented for the jury where the employee was injured as he and another were tipping a bibbit pot, even though again the employee had not requested additional help and evidence showed that such help would have been furnished if requested.

In the foregoing *Thompson* and *Deen* cases, the intermediate courts applied the same formula as applied particularly by the trial court in this case, namely: petitioner was performing a task on his own, and the railroad did not direct him; he did not seek help and did not seek a safer method, although the latter was available; therefore, concluded the courts, the railroad could not have anticipated the injury, that is, the railroad was not negligent. This is precisely the same erroneous reasoning condemned in the *Tiller* case and applied by the trial court in the instant case, as we have shown.

We interject here, parenthetically, that in view of this Court's judgments in the *Deen* and *Thompson* cases, the validity of the prior decision of the Alabama Supreme Court in the case of *Louisville & Western Ruy. Co. vs. Green*, 53 S. 2d 358, is open to serious doubt. This was the case so heavily relied upon by the trial court and by respondent throughout these proceedings. Whatever weight may be attached to the *Green* case, that case is decisively and conclusively distinguished from the instant one on the basis of the evidence of employee Brown's actual knowledge of the conditions and participation in the activity leading to and including the petitioner's injury. No such evidence was present in the *Green* case.

If the Ohio courts had distinguished between petitioner's conduct and that of respondent as they were clearly required to do under the law, the correct inquiry in assessing the evidence in this case could then have been made. Was there evidence of any probative value to show negligence on the part of the respondent and did such negligence play any part, even the slightest, in producing the petitioner's injuries? If that test, aside from petitioner's conduct, had been applied as it should have been, one and only one lawful result would have followed. This was and is a case for the jury's determination.

CONCLUSION

This Court should grant writ of certiorari, review this case, reverse the judgment of the Court of Appeals and order a new trial of the issues by jury.

Respectfully submitted,

C. Richard Grieser,
8 East Broad Street, Columbus 15, Ohio,
Attorney for Petitioner.

APPENDIX A

Court of Common Pleas of Franklin County, Ohio

No. 200,175

CARSON J. MAY,

Plaintiff,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Defendant.

DECISION

Rendered this 14th day of March, 1961.

REYNOLDS, J.

This case is before the Court on plaintiff's motion for a new trial.

The action is one of personal injuries claimed to have been suffered when plaintiff, an employee of defendant company, and another employee were endeavoring to carry a tub of coal into a tool shed past a motor car which stood in the doorway.

On the morning of January 15, 1957, a crew of trackmen went to a tool house of defendant company to prepare for the day's work. In this tool house was a motor car which was to be used and on which some work was to be done. In order to perform this work the motor car was pushed out into the doorway so that the men could see to do the required work, there being no artificial light in the building. After this work was completed, plaintiff and another employee proceeded to pick up coal along the tracks in the

vicinity of the building, both for the purpose of cleaning the right of way and for fuel to use in a stove in the building when desirable. From the evidence adduced, it appears that there was no fire in the stove at the time nor was it contemplated that the coal was to be used that morning, and the evidence is rather nebulous as to whether the men were gathering coal by an express order or simply from a suggestion of one of the crew.

Plaintiff testified that the foreman had requested him to get the coal, but the foreman himself testified that the getting of coal was suggested by one of the crew and he simply O.K'd the request.

In any event, this was a customary procedure whenever the supply of coal in the building was exhausted or low.

While the coal was being gathered, the foreman left to make a phone call, ostensibly to secure orders, and in his absence the men returned with the coal and proceeded to carry it into the building.

In order to do so, it was necessary to raise the tub of coal above the motor car as there was not enough room between the car and the side of the door frame for the tub to pass, and it was in the operation of raising the tub of coal that plaintiff claims to have been injured.

Plaintiff predicates his claim of liability as follows:

> "Defendant negligently failed to furnish plaintiff a safe place to work; defendant negligently failed to furnish plaintiff with safe or adequate equipment or a safer method or means of performing said job; defendant negligently blocked the entrance to the coal house with its motor car although it knew or should have known that plaintiff or other workmen would be required to carry coal through the entrance to said tool house."

At the conclusion of plaintiff's case, the Court sustained defendant's motion for a directed verdict, not as counsel

for plaintiff argue on the ground of plaintiff's contributory negligence or assumption of risk, but for a failure to prove any negligence on the part of defendant or a failure to furnish plaintiff a safe place to work.

As before pointed out, it was customary to gather coal along the track for the purposes already stated, and there is nothing to suggest that to use a tub with two handles, as the one in question was, was not a suitable or safe method for performing this work, so that the allegation that defendant failed to furnish safe equipment or a safer method for performing the work, fails entirely. It was a simple and usual process and there is no suggestion as to how otherwise it should be or could be done. Is it claimed that the defendant should have furnished mechanical equipment for the simple process of gathering coal? No suggestion is made as to how the work should have been done, merely a criticism of the method used.

Apparently on counsel's theory of the case, had plaintiff injured his back in stooping down to pick up a lump of coal, defendant would be liable for a failure to provide proper equipment for this work.

The claim is made the defendant was negligent in blocking the doorway. The fact is that the doorway was not blocked so as to interfere with the men passing in and out, and the motor car was there only temporarily and for the purpose of enabling the men to do some repairs thereon. It could easily have been pushed out or in as was either desired or necessitated, and it is not true, as counsel argue, that the foreman in charge had actual knowledge that a heavy tub of coal would be carried through that doorway.

There is absolutely no evidence that the foreman had any knowledge that the tub would be so filled as to make it difficult to carry, or that the men would try to carry it through the door through the narrow space available. It is

just as reasonable or consistent to argue that the foreman had actual knowledge that the men would not try to carry the coal into the building so long as the motor car was standing in the door, since there was no necessity for so doing.

The facts in this case differ materially from the facts in the case of *Wilkerson vs. McCarthy*, 336 U.S. 53. In that case the Supreme Court held that the Railroad Company was liable for injuries received by an employee in crossing a pit in a roundhouse over a board, rather than walking around the pit, only a slightly longer distance. The fact was that the employees had been accustomed to cross the pit on a 22-inch plank, four feet and two and a half inches long. The petition recited that defendant failed to furnish plaintiff a safe place in which to work in that the plank was not firmly set, was not securely attached, and had been permitted to become greasy, oily and slippery, thereby causing petitioner to lose his balance, slip and fall into the pit.

It appears that this means of crossing the pit was used as a walkway by all employees up to May 1, 1945, at which time the company put up "safety chains", inclosing a part of the pit on its north, south and west sides. The chains were fastened to posts 42 inches high and two inches from the top thereof. The posts were removable, fitting into tubes fastened in the ground and were kept up while the pit was in use, and taken down when the pit was not in use, and when the pit was completely covered with boards.

But even when the chains were up, the plank walk could be and was used, and was supposed to be used by pit workers. Plaintiff was not a pit worker but a switch man. According to the opinion, the company had never, even after the "safety chains" were installed, forbidden any of the workers from crossing the pit on the plank in ques-

tion, nor were written rules or spoken instructions promulgated forbidding any employee the use of said walk.

There was evidence adduced that switchmen and other employees continued the practice of using this walk at all times, whether the chains were up or down.

In its opinion the Court quoted from the decision of the Supreme Court of Utah, from which court the case was appealed to the U. S. Supreme Court, as follows:

> "It must be conceded that if defendants knew, or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure."

The U. S. Supreme Court then went to say:

> "We agree with this last quoted statement of the Utah Court, and since there was evidence to support a jury finding that employees generally had habitually used the board as a walkway, it was error for the trial judge to direct a verdict in favor of respondents."

The distinction between the facts in that case and the instant case is at once apparent. In that case as the Supreme Court said, if defendant had knowledge of the general and continued used of the walk by employees, it presented a question for the jury as to whether the company was negligent, but not as a matter of fact that it was negligent.

Here we have an isolated instance of a particular situation in which plaintiff was working with a motor car standing in the doorway which manifestly did not interfere with the ordinary ingress and egress from the building and which condition was created by the crew of which plaintiff was a part

There is no evidence that any of the employees had carried coal into the building under the same or similar conditions before and no knowledge attributed to defendant that coal would be carried into the building under such conditions.

Counsel's argument that the other employee who was assisting in the process, by starting through the opening ahead of plaintiff, in effect compelled plaintiff to follow, is not persuasive, as plaintiff had equal control over the method used and had as much right to stop as he had to proceed.

The case of *Louisville & W. R. Ry. Co. vs. Green*, 255 Ala. 642, presents an analogous situation. In that case the plaintiff injured his back while lifting a heavy sack of mail on top of a load of mail sacks he had already loaded on a truck and which were piled at a height above plaintiff's head.

Plaintiff secured a verdict upon the trial which was reversed by the Supreme Court of Alabama. In its opinion the Court said:

> "The evidence further tended to show that the average weight of the bags of mail handled by appellee was about 30 pounds and that postal clerks regularly and usually handled the bags without assistance and that appellee had not complained that the bags of mail were too heavy for him to handle; that no one told appellee how heavy a load to haul and transport at each trip to and from the postoffice; that he was free to place whatever number of bags of mail on each load and use either the four wheel truck or the two wheeled cart; that there were two or three other four wheeled trucks at the station which he could use in handling the mail, and that no one told him how to handle the bags of mail; that he had at least two hours idle time during his shift or tour of duty and there is nothing in the record to indicate that the element of time was a factor in causing appellee to load all the outgoing mail bags on one truck or to pile them high on one truck."

Syllabus No. 8 of that case reads as follows:

> "An employer cannot be held guilty of negligence, rendering him liable for injuries to employee, in failing to provide adequate force to do specific work if there is a safe and reasonable way for employee to do such work with force in hand, but may reasonably assume that employee will adopt such a plan as to conserve his own safety."

Here, as in the Green case, plaintiff was, as it were, on his own. No one told him how much coal to put in the tub, and no one directed him to deliver the coal into the building while the doorway was partially blocked, and there is nothing in the record to indicate that the element of time was a factor in causing the plaintiff to act as he did.

It would be difficult to find a case more nearly analogous to the instant case, both as to the operative facts and as to the principle involved.

The Court is of the same opinion now as at the time of directing the verdict, namely, that there is a complete lack of proof of any negligence on the part of defendant, and the plaintiff's motion for a new trial is overruled.

DANA F. REYNOLDS, *Judge.*

Appearances:
DOMBEY, TYLER, RICHARDS & GRIESER,
Attorneys for Plaintiff.
BRICKER, EVATT, BARTON, ECKLER & NIEHOFF,
Attorneys for Defendant.

APPENDIX B

In the Court of Appeals of Franklin County, Ohio

No. 6749

CARSON J. MAY,
Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

OPINION

Rendered on March 13, 1962.

DOMBEY, TYLER, RICHARDS & GRIESER,
MR. ROBERT C. TYLER, and
MR. C. RICHARD GRIESER, *of Counsel*,
8 East Broad Street, Columbus 15, Ohio,
For Plaintiff-Appellant.

BRICKER, EVATT, BARTON, ECKLER & NIEHOFF,
MR. ROBERT L. BARTON, and
MR. JOHN ECKLER, *of Counsel*,
50 West Broad Street, Columbus 15, Ohio,
For Defendant-Appellee.

DUFFY, J.

From the judgment entered, following a direction of the verdict for the defendant, the plaintiff-appellant herein, has appeal to this court alleging that the trial court erred in instructing the jury to return a verdict in favor of the defendant-appellee herein, at the end of the plaintiff's case.

The plaintiff was a member of a track crew assigned to the job of maintaining the track and right of way of defendant. He reported for work at a tool house where the motor car, which transported the crew to and from their work, was kept. This tool house was heated by a pot-bellied stove, and it was the practice of the employees to gather coal from the tracks to use in the stove. There was no light provided inside this tool house and whenever work was needed on the motor car it was necessary to push the car out of the room so that the men could see to repair the car. That morning, work was needed to be performed on the motor car and, as was the custom, they pushed the car out and into a position so that it was partially in the doorway. While the work was being performed on the motor car the plaintiff and another employee went out along the track to gather coal and they returned with a tub full of coal after the car had been repaired but while it was still in the doorway. The foreman was on the telephone attempting to get clearance so that they could push the car out onto the main track and proceed to the place where they were to work that day. Plaintiff and his co-worker tried to carry the tub full of coal into the tool house while the motor car was in the doorway and they found it necessary to lift the tub upwards and, while the plaintiff was going through the doorway, he found it necessary to twist his body sideway and suffered an injury to his back.

The trial court directed a verdict solely on the ground that the plaintiff had not shown that the railroad company was negligent.

The plaintiff feels that, in view of the cases of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct., 443, and *Harris v. Pennsylvania Roalroad Co.*, 361 U.S. 15, 80 S. Ct. 22, and numerous other holdings of the U. S. Supreme Court, the trial court was required to submit the question

of the railroad's negligence to the jury. He contends that the railroad was negligent in leaving the motor car in the doorway so that there was insufficient room for the employees carrying tubs of coal to get through, and because the other employee went through the doorway first, it raised the question of knowledge through the other employee, that plaintiff could not get through the doorway while the motor car was in that position.

If there were any probative facts from which a jury could find that the railroad company was or should have been aware of conditions which created a likelihood that the petitioner would suffer such an injury as he did, it is clear that the issue must be submitted to the jury. See *Ringhiser v. Chesapeake & Ohio Railway Company*, 354 U.S. 901, 77 S. Ct., 1093.

In this case it appears to be the first time that the tub of coal was ever carried through the doorway while the motor car was in the entrance way, and it further appears that the place where the motor car rested was the place at which it was customarily moved whenever work was needed on it.

It does not appear from the record that there is any evidence indicating any unusual or extraordinary activity on the part of the railroad company and, since the test is the negligence of the employer rather than an injury arising out of and received in the course of employment, we cannot say that the trial court was wrong. The judgment should be affirmed.

Judgment affirmed.

Duffy, P.J., and Bryant, J., concur.

APPENDIX C

In the Court of Appeals of Franklin County, Ohio

No. 6749

CARSON J. MAY,
Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

ENTRY

This appeal came on for hearing on the assignments of error, the original papers and transcript from the Court of Common Pleas of Franklin County, Ohio, and on consideration of the briefs and argument of counsel, the Court find there is no error prejudicial to appellant apparent on the record in the proceedings and judgment by the court below; and that substantial justice has been done but there was a reasonable cause for the appeal.

It is, therefore, considered and adjudged that the judgment of the court below be and it is hereby affirmed, without penalty.

It is further ordered and adjudged that appellant pay the costs of this proceedings.

s/ J. DUFFY,
s/ J. DUFFEY,
s/ J. BRYANT.

Approved:
DOMBEY, TYLER, RICHARDS & GRIESER,
Attorneys for Plaintiff-Appellant.
BRICKER, EVATT, BARTON, ECKLER & NIEHOFF,
Attorneys for Defendant-Appellee.

Filed March 29, 1962.

APPENDIX D

In the Supreme Court of Ohio

No. 37593

CARSON J. MAY,
Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,
Defendant-Appellee.

NOTICE OF APPEAL

Carson May, plaintiff-appellant in case No. 6749 in the Court of Appeals for Franklin County, Ohio, hereby files in this court his notice of appeal to the Supreme Court of Ohio from the entry of judgment rendered by the Court of Appeals from Franklin County, Ohio, in case No. 6749 and journalized on the 29th day of March, 1962, which judgment affirmed the judgment of the Court of Common Pleas for Franklin County, Ohio rendered in favor of defendant-appellee and against plaintiff-appellant.

The parties in said appeal in case No. 6749 in the Court of Appeals for Franklin County, Ohio were Carson May, plaintiff-appellant and the Pennsylvania Railroad Company, a corporation, defendant-appellee. This appeal is on questions of law and is taken on condition that a motion to certify record be allowed by the Supreme Court of Ohio.

s/ Dombey, Tyler, Richards & Grieser,
Eight East Broad Street, Columbus 15, Ohio,
Attorneys for Plaintiff-Appellant.

Proof of Service

The undersigned, attorneys for the Pennsylvania Railroad Company, a corporation, defendant-appellee, hereby acknowledges receipt of a copy of the foregoing Notice of Appeal on this 16th day of April, 1962.

/s/ Bricker, Evatt, Barton, Eckler & Niehoff,
50 West Broad Street, Columbus 15, Ohio,
Attorneys for Defendant-Appellee.

In the Supreme Court of Ohio

No. 37593

CARSON J. MAY,
Plaintiff-Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

MOTION TO CERTIFY RECORD

Carson J. May, the plaintiff-appellant herein, moves this Court for an order directing and requiring the Court of Appeals of Franklin County, Ohio, to certify the record in Case No. 6749 in said Court of Appeals for review by this Court, in which said Court of Appeals Carson J. May was plaintiff-appellant and the Pennsylvania Railroad Company was defendant-appellee.

The grounds for this motion are:

1. That the questions and issues involved in this case are of public and great general interest;

2. That error prejudicial to plaintiff-appellant was committed in this case in the Court of Common Pleas wherein judgment was entered in favor of defendant-appellee pursuant to a directed verdict and in the Court of Appeals of Franklin County, Ohio, whereby judgment was entered affirming the aforesaid judgment of the Court of Common Pleas.

Plaintiff-appellant filed Notice of Appeal in the Court of Appeals of Franklin County, Ohio, and in this Court on April 17, 1962.

The grounds for granting of this Motion to Certify, as heretofore set forth, will be presented more fully in plaintiff-appellant's assignment of errors and brief in support of this motion.

Respectfully submitted,

DOMBEY, TYLER, RICHARDS & GRIESER,
8 East Broad Street, Columbus 15, Ohio,
Attorneys for Plaintiff-Appellant.

Acknowledgment of Service

A copy of the foregoing Motion to Certify Record was received by the undersigned, counsel for defendant-appellee, on this ... day of April, 1962.

Attorney for Pennsylvania Railroad Company,
Defendant-Appellee.

In the Supreme Court of Ohio

Appeal from the Court of Appeals for the
Tenth District of Ohio
Franklin County

(No. 6749)

CARSON J. MAY,
Plaintiff-Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

ASSIGNMENT OF ERRORS AND BRIEF OF THE PLAINTIFF-APPELLANT IN SUPPORT OF MOTION TO CERTIFY

ASSIGNMENT OF ERRORS

Carson J. May, plaintiff-appellant, hereby makes and files the following Assignment of Errors herein, each of which is prejudicial to the rights of plaintiff-appellant:

1. The Court of Common Pleas for Franklin County, Ohio, erred in directing the jury to return a verdict in favor of defendant at the close of plaintiff's case and in entering judgment thereon.
2. The said trial court erred in overruling plaintiff's motion for new trial.
3. The Court of Appeals for Franklin County, Ohio, erred in affirming the judgment of the said Court of Common Pleas.

Carson J. May.
Attorneys for Plaintiff-Appellant.

THE SUPREME COURT OF THE STATE OF OHIO

1962 TERM

THE STATE OF OHIO,
City of Columbus.

To wit: Wednesday, October 10, 1962.

No. 37593

CARSON J. MAY,
Plaintiff-Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled. Costs:

Motion Fee, $20.00, paid by Dombey, Tyler, Richards & Grieser.